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IN THE

Supreme Court of the United States

October Term, 1980

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230
(412) 288-3122

Counsel for Petitioner
*Counsel of Record

Of Counsel:
RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

QUESTIONS PRESENTED

Where, in investigating a charge of salary discrimination filed on behalf of female faculty members employed in a Nursing School of a University employer,[1] the Equal Employment Opportunity Commission ("EEOC") subpoenas as "relevant" evidence under 42 U.S.C. §2000e-8(a) the salary and personnel records of faculty employed in Schools of Pharmacy, Health-Related Professions and Social Work and the employer's verified answer denies that salaries in other professional schools are relevant:

1. Has the EEOC subpoenaed relevant evidence where its unsupported belief is that all faculty members are "teachers" performing "similiar duties," but the employer's unrebutted evidence proves that faculty members in different professional schools have such different functions, skills, responsibilities and disciplines that their salaries and jobs are neither similar nor comparable?

2. Can claims of sex discrimination in salaries paid in one profession be proven by evidence of salaries paid in unrelated, dissimilar and non-comparable professions?

3. Do the subpoena enforcement standards of *United States v. Powell,* 379 U.S. 48 (1964), apply to Title VII and, if so, does the EEOC have the burden of proving the relevance of the information subpoenaed?

4. Is a ruling, based upon undisputed facts, that subpoenaed information is relevant a factual finding reviewable under a "clearly erroneous" standard or a legal conclusion reviewable as an error of law?

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1. The University of Pittsburgh is a non-profit corporation and has no parents or subsidiaries within the contemplation of Rule 28.1 of the Rules of the Supreme Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, University of Pittsburgh, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated March 17, 1981, is unofficially reported at 25 CCH Empl. Prac. Dec. ¶ 31,677 and appears as Appendix A hereto. The opinion of the United States District Court for the Western District of Pennsylvania dated March 26, 1980 enforcing the subpoena is reported at 487 F. Supp. 1071 and appears as Appendix B hereto. The order of the District Court dated April 7, 1980 denying the University's Motion for Rehearing is unreported and appears as Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 17, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 709(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-8(a), provides for access by the EEOC to evidence relevant to a charge under investigation. Section 710 of Title VII, 78 Stat. 264, *as amended*, 42 U.S.C. §2000e-9, applies Section 11 of the National Labor Relations Act to investigations conducted by the EEOC. Section 11 of the National Labor Relations Act, 49 Stat. 455, *as amended*, 29 U.S.C. §161(1) and §161(2) provides for the summoning of witnesses and court enforcement of subpoenas. These statutory provisions are set out verbatim in Appendix D.

STATEMENT OF THE CASE[2]

On July 8, 1977, Margaret F. Carroll of the American Nurses' Association filed a charge of sex discrimination with the EEOC accusing the University of discriminating against female faculty members by paying them lower salaries and fringe benefits than males. (R.9a). The charge was filed on behalf of 29 full-time faculty members of the University's School of Nursing. (R.10a-14a, 81a, 155a).[3]

On August 1, 1978, the EEOC issued a subpoena to the University demanding, for a three-year period, the

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2. References are to the Record (Appendix) in the Third Circuit below.

3. The complete charge is set out in note 1 of the Opinion of the Third Circuit. (App. A at 3a). The Third Circuit found that the EEOC was investigating "unlawful discrimination by the University against female faculty members in the School of Nursing." (App. A at 2a).

sex, date of hire, date of termination, academic degree, tenure/non-tenure status, positions held, initial and present salaries, functional job description and job qualifications of every full-time and part-time Assistant Instructor, Instructor, Assistant Professor, Associate Professor and Professor employed in four separate and distinct professional schools of the University: Nursing, Social Work, Health-Related Professions and Pharmacy. (R.26a-28a).[4]

The EEOC claimed that salaries and job information on faculty members other than in the School of Nursing would demonstrate the employment practices and patterns of the University and would support the charge of discrimination if "women instructors and professors performing similar duties are paid lower salaries than male instructors and professors." (R.33a). The University had explained to the EEOC that the highly sensitive and confidential salaries could not be so compared because of the vast differences between faculty members teaching different disciplines in different schools. (R.30a-31a).

On November 19, 1979, the EEOC applied to the District Court for an order enforcing the subpoena. (R.4a-34a). In its verified answer, the University *inter alia* denied the relevance of the subpoena and alleged that the information sought was beyond the scope of any relevant inquiry, was immaterial, involved inappropriate comparisons, and invaded confidential faculty records. (R.37a-44a).

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4. The subpoena is set out in note 2 of the Opinion of the Third Circuit. (App. A at 3a-4a). The subpoena covers 190 full-time and all part-time faculty members in the four Schools. (R. 160a).

At the hearing in the District Court, the University requested that the EEOC support, by competent evidence, its averments of relevance, proper purpose and compliance with applicable law and regulations. The District Court overruled the request and placed upon the University the burden of going forward with the evidence. (R.82a-84a). The University then called as of cross-examination Paul Southworth, the EEOC Compliance Officer handling the charge.

Mr. Southworth was unable to explain the reason he selected the four schools of the University or why he subpoenaed the information he did. Initially, he stated that he decided he would question the charging parties to find out what health-related schools were similar to the School of Nursing. (R.58a). The only reason he could give for the scope and content of the subpoena was that all faculty members "are teachers." (R.58a, 59a, 60a, 72a, 73a). He finally conceded that he did not know why he subpoenaed the information he did (R.60a):

> "Q Why did you pick the School of Pharmacy?
>
> "A Well, like I said, its been a year and a half since we had the case. As to why we actually decided on those particular schools, I would be really taxing my memory at this point because, like I said, it was discussed between myself and District Counsel at that time. And I've had numerous cases since that time.
>
> "Q Would it be fair to summarize your testimony as saying you know you had a reason at that time, but you can't remember what it was today? Is that a fair statement?
>
> "A That's correct."

Counsel for the EEOC then had Mr. Southworth testify that the sole purpose for the subpoena was to compare female faculty members in one School with male faculty members in another School (R.74a-75a):

> "Q Is it your testimony now that the purpose for this information was to compare a School of Nursing Instructor with a School of Engineering Instructor?
>
> "A Well, that would—would have been one of the comparisons.
>
> "Q Is it your statement that the purpose of the investigation was to compare the School of Pharmacy Professor with a School of Nursing Professor?
>
> "A Yes, that would have been another comparison.
>
> "Q Is it your statement now then that the sole purpose of this request for information was to request information that would allow you to compare instructors or professors across school lines?
>
> "A Yes."

After the sole purpose for the subpoena was established, the Deans of the four Schools testified. Their unrebutted, undisputed testimony proved that the comparisons sought to be made by the EEOC could not be made and would be irrelevant to Nursing School salaries.

The Deans testified that each School had striking differences in the factors influencing faculty salaries, duties and responsibilities, such as level of faculty education, level of academic programs, teaching loads, length of contracts, research duties, publishing activities, external competition for faculty services, and so forth. Exhibit A (R.160a) charted these differences and

eventually was stipulated to as accurate by the EEOC. (R.140a, 150a).

Both the chart and the testimony established that faculty salaries in one School had no relevance to salaries in other Schools since the different professional schools had separate and distinct missions, different average levels of faculty academic achievement, different sources of external funding and different requirements for faculty to publish or do clinical research. Additionally, each school was unique in the extent of its graduate and undergraduate programs, its accreditation regulations, and the ability of its faculty members to engage in private practice. Most importantly, salaries of faculty members were influenced by the marketplace—*e.g.*, the School of Pharmacy had to offer a salary high enough to attract professionals to the School as an alternative to working as a private practicing Pharmacist or for a large pharmaceutical company. (R.66a-67a).

On March 26, 1980, the District Court issued an Opinion and Order enforcing the subpoena. While recognizing that the University's testimony on the vast differences between faculty members in separate schools contrasted with the EEOC's belief that all instructors and professors were "performing similar duties," the District Court ruled that it "could not take the word of the University" that any comparisons were meaningless, especially since "the entire faculty in the School of Nursing is female."[5] (App. B at 20a-23a).

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5. In fact, at least one faculty member was male. (*e.g.*, 156a, 177a). The District Court also erred in treating the School of Social Work as a health-related School and in failing to examine, as requested by the University, the need for information on part-time faculty members.

The District Court also held that there was a University-wide policy being challenged, and that claims of confidentiality and privilege lacked merit. The District Court ignored the University's proposed findings of facts. (R.45a-53a).

The University appealed the judgment of the District Court[6] to the United States Court of Appeals for the Third Circuit. On March 17, 1981, The Third Circuit affirmed the decision of the District Court. The Third Circuit held that the trial court's ruling that the subpoenaed information was relevant was not clearly erroneous because "such information may provide a useful context for evaluating the practices under investigation" and because the School of Nursing was "almost totally female." (App. A at 6a-7a). The Third Circuit, while recognizing the Government's burden of proving relevance, did not rule on the University's contention that the burden of proof had been improperly placed on the University.

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6. On April 4, 1980, the University had filed a motion for rehearing in the District Court on the grounds (R.174a-183a) that: contrary to the court's decision, the University consistently had denied the validity of the subpoena; the court incorrectly found as a fact that none of the faculty in the School of Nursing were male; the court failed to find that the uncontradicted evidence proved comparisons across school lines were inappropriate; the court improperly placed the burden of proof on the University; the court incorrectly found that the School of Social Work was a health-related school; and the court failed to distinguish between full-time and part-time faculty members. On April 7, 1980, the District Court denied the University's Motion by taking the University's proposed Order, crossing out its provisions and writing across it "Motion denied." (App. C at 29a-30a).

REASONS FOR GRANTING THE WRIT

Conflicting principles are applied in the Circuit Courts of Appeal on whether salaries paid in different branches of a multi-faceted employer to unequal, dissimilar and noncomparable professions are relevant to each other in Title VII subpoena enforcement actions or litigation on the merits of a discrimination charge. Aspects of this issue are already before this Court in two pending cases, the resolution of which will affect the outcome of the instant case.

In addition, the Court of Appeals for the Third Circuit has decided issues of great significance to academic institutions and the business community which have not been passed upon by this Honorable Court. A decision on the issues raised by this petition will be of great use, will provide guidance and will limit litigation on these matters in the future.

Finally, the decision below grants the EEOC unbridled discretion in the course of its investigation of charges of discrimination. Administrative subpoenas for irrelevant, confidential and sensitive salary records which can then be disclosed to charging parties, invades the privacy of individuals, disrupts the operation of institutions, fosters employee resentment and encourages litigation. In light of the serious adverse consequences to academic and business employers which result from the decision below, this Court should review the decision.

ARGUMENT

1. This Court Should Grant Certiorari Because The Decision Below Conflicts In Principle With Decisions Of Other Courts Of Appeals As To The Relevancy Of Salaries Paid In One Profession To Salaries Paid In A Totally Different Profession.

From its inception, a university has been a place of useful, professional training. The job of the medieval university was to produce a number of professionals which contemporary society needed—lawyers, doctors, clergy, civil servants and scholars.[7] The modern university has its roots in the medieval concept of a community of scholars practicing separate and distinct professions and disciplines. As a result, colleges and universities are unique among those employment settings covered by Title VII. Unlike blue-collar workers on an assembly line, academicians with different professional backgrounds, training and experience are neither similar to nor comparable to one another.

The EEOC's subpoena in the instant case sought from the University the salaries, experience, qualifications, job histories, job descriptions and other information on all full-time and part-time faculty members employed in four separate and distinct professional schools to determine if female faculty members were being paid less than males for "performing similar duties." At trial, the EEOC testified that the "sole reason" for the information sought was to compare faculty members' salaries across professional school lines.

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7. W. NIBLETT, UNIVERSITIES BETWEEN TWO WORLDS, at 16 (Halsted Press, 1974).

While statistical comparisons are permitted in Title VII litigation, *Teamsters v. United States,* 431 U.S. 324 (1977), statistical information is relevant only if it compares similar groups of people. *See Hazelwood School District v. United States,* 433 U.S. 299, 308, n.13 (1977); *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620-621 (1974). The evidence adduced below unequivocally demonstrated that faculty members in different professional schools not only do not perform "similar duties," but also that their jobs are so different that they cannot even be compared on any rational basis.

Other courts of appeals have found that salary discrimination cannot be proven by comparison of the salaries of one profession with those of another. *E.g., Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980) (comparison of nurses' jobs to other jobs is inappropriate). *See, e.g., Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (female professor could not show sex-based salary discrimination by comparing her salary to the salaries of professors in other departments of the university); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (female clerical employees at a state university could not establish salary discrimination by comparing their salaries with male employees in a school's physical plant department). *Compare, International Union of Electrical Workers v. Westinghouse Electric Corporation,* 631 F.2d 1094 (3d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3456 (Dec. 11, 1980) (assembly line jobs historically ranked on a job point salary scale may be compared under Title VII); *Gunther v. County of Washington,* 602 F.2d 882 (9th Cir.), *reh. de-*

nied, 623 F.2d 1303 (9th Cir. 1979), *cert. granted,* 101 S.Ct. 352 (1980) (jobs of male prison guards and female matrons in the same prison may be compared); *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974) (salary and personnel records of all faculty members in an Engineering School are relevant to a charge of national origin discrimination by an Associate Professor in the Electrical Engineering Department of that School).

If salary comparisons between groups of employees who perform different jobs are irrelevant to prove discrimination under Title VII, they are likewise irrelevant to an EEOC investigation of whether discrimination exists. Moreover, the fact that a particular group of employees—here, School of Nursing faculty members—is predominantly female does not make their jobs similar to other professions.

An analogous conflict in principle also exists in the courts of appeals concerning whether a charge of discrimination by an employee in one discrete department of a multi-faceted employer can support an EEOC subpoena for records of employees in other departments or locations.

One line of circuit court cases suggests that EEOC subpoenas must be limited to the unit employing the charging party. *See, e.g., EEOC v. Packard Electric Division, General Motors Corp.,* 569 F.2d 315 (5th Cir. 1978) (in investigating two individual charges of discrimination, plant-wide "workforce breakouts" could not be subpoenaed because they went beyond the employee's work unit); *accord: Marshall v. Westinghouse Electric Corp.,* 576 F.2d 588, 592 (5th Cir.) *reh. denied,* 582 F.2d 966 (5th Cir. 1978) (in age discrimination suit, field operator may not seek employment in-

formation regarding 7500 employees without a showing of a special need for information beyond his employing or work unit); *Joslin Dry Goods Co. v. EEOC,* 336 F. Supp. 941 (D. Col. 1971), *aff'd in relevant part,* 483 F.2d 178 (10th Cir. 1973) (charge of race discrimination by an individual employed at one store does not justify an EEOC subpoena for employment records at other retail outlets of the employer); *Union Bank v. EEOC,* 296 F. Supp. 313 (C.D. Cal. 1967), *aff'd on other grounds,* 408 F.2d 867 (9th Cir. 1968) (charge of discrimination by female bank lawyer does not justify an EEOC subpoena for records of all employees in all departments and branches).

Another line of circuit court decisions, however, hold that individual charges of discrimination support an EEOC subpoena for employment records of unrelated departments or locations. *See, e.g., EEOC v. Western Publishing Co.,* 502 F.2d 599 (8th Cir. 1974); *Parliament House Motor Hotel v. EEOC,* 444 F.2d 1335, 1340 (5th Cir. 1971); *Blue Bell Boots, Inc. v. EEOC,* 418 F.2d 355, 358 (6th Cir. 1969).

These conflicts in principle between the decisions of the courts of appeals of the United States present this Court with the important issue of whether salaries paid in different branches of a multi-faceted employer to unequal, dissimilar and noncomparable professions may be demanded through the use of administrative subpoenas on the ground that the salaries are relevant to each other. A grant of certiorari should issue to resolve these conflicts.

2. This Court Should Grant Certiorari Because The Decisions Below Involve Issues Presently Pending Before This Court, The Resolution Of Which Will Have A Direct Bearing On This Case.

Two cases presently are pending before this Court which will have a significant impact on the resolution of this action. *Gunther v. County of Washington,* 602 F.2d 882 (9th Cir.), *reh. denied,* 623 F.2d 1303 (9th Cir. 1979), *cert. granted,* 101 S.Ct. 352 (1980), was argued before this Court on March 23, 1981. In *Gunther,* female prison guards at a jail in which both men and women worked as guards alleged that they were denied equal pay for equal work and, alternatively, that pay discrepancies for work not substantially equal was the result of sex discrimination.

After affirming the District Court's finding that the jobs of male and female guards were not substantially equal, the Ninth Circuit rejected the employer's argument that the Bennett Amendment imposed the Equal Pay Act's "equal pay for equal work" standard on Title VII wage discrimination claims. Instead, the Ninth Circuit held that the Bennett Amendment incorporated only the Equal Pay Act's four affirmative defenses and not the requirement of equal work in Title VII actions. As a result, the Ninth Circuit permitted comparisons of similar but unequal jobs in assessing the presence of a Title VII violation.

In *International Union of Electrical Workers v. Westinghouse Electric Corp.,* 631 F.2d 1094 (3d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3456 (Dec. 11, 1980), the Third Circuit adopted the Ninth Circuit's view of Title VII in holding that assembly line jobs which were unequal, but which the employer historically had point-

rated in relation to each other, could be compared to determine wage discrimination under Title VII.

If this Court reverses the holdings of *Gunther* or *Westinghouse* and instead approves the decisions of the Fourth, Eighth, and Tenth Circuits,[8] then the Third Circuit's decision in this action must be reversed because here the EEOC concedes and the facts show that the professions involved are not equal.

Similarly, if this Court finds in *Gunther* or *Westinghouse* that unequal but similar jobs may be compared in a Title VII wage discrimination action if certain criteria are met, then the decision below must be reversed because the facts show that the faculty jobs at issue are not similar.

On the other hand, if this Court decides in *Gunther* or *Westinghouse* that totally different jobs may be compared if certain criteria are met, then the decision below either must be affirmed, or it must be remanded for a determination of whether such criteria have been met.

Therefore, while this is not a case in which so-called "comparative worth" of dissimilar, but comparable jobs has been directly put at issue, since the jobs in this case are not comparable, this Court's resolution of *Gunther* or *Westinghouse* will substantially affect the resolution of this action.

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8. *See, e.g., Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977); *Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977).

3. This Court Should Grant Certiorari To Resolve Whether The United States v. Powell Standards For Subpoena Enforcement Apply To Title VII And, If So, Whether An Administrative Agency Can Satisfy Its Burden Of Proof Of Relevancy Of The Information Subpoenaed Through Controverted Pleadings.

In order to secure enforcement of an Internal Revenue Service subpoena, the Government must establish that the subject investigation is conducted pursuant to a legitimate purpose, the inquiry is relevant to that purpose, the information sought is not in the agency's possession and the required administrative procedures have been followed. If this burden is satisfied, the party subpoenaed has the burden of proving bad faith or abuse of process. *United States v. Powell,* 379 U.S. 48, 57-58 (1964); *United States v. LaSalle National Bank,* 437 U.S. 298, 313 (1978). At least with respect to the Internal Revenue Service, a subpoena enforcement action is an adversary proceeding which should afford a judicial determination to the person or company summoned. *Reisman v. Caplin,* 375 U.S. 440, 446 (1964).

There is no decision of this Court dealing with EEOC subpoenas and the extent to which the *Powell* standards apply to Title VII. Nor has this Court determined the nature of adversary subpoena enforcement actions and how the Government agency satisfies its burden of proof. The circuit courts have not found a consistent approach to these issues.

In the Third Circuit, at least until the instant Title VII case, where the allegations of a subpoena enforcement petition are denied or controverted, the Government has to go forward to prove that the summons com-

plies with the *Powell* requirements. *United States v. McCarthy,* 514 F.2d 368, 372-73 (3d Cir. 1975). *See United States v. Garden State National Bank,* 607 F.2d 61, 70-71 (3d Cir. 1979).

In some circuits, however, the *Powell* standards can be satisfied by affidavit, although it is unclear if this rule is applicable if the respondent disputes the facts in the affidavit. *See, e.g., United States v. Davis,* 636 F.2d 1028, 1034 (5th Cir. 1981); *United States v. Horton,* 629 F.2d 577, 579 (9th Cir. 1980); *United States v. Moon,* 616 F.2d 1043 (8th Cir. 1980); *United States v. Freedom Church,* 613 F.2d 316 (1st Cir. 1979).[9] In the Tenth Circuit, with respect to subpoenas of the National Labor Relations Board, the burden of proving lack of relevance by specific evidence has been placed on the respondent. *N.L.R.B. v. Dutch Boy, Inc., Glow Lite Division,* 606 F.2d 929, 932 (10th Cir. 1979).

With respect to EEOC subpoenas in the Eighth Circuit, no adversary hearings are deemed necessary in subpoena enforcement actions. *See EEOC v. Chrysler Corp.,* 567 F.2d 754, 755 (8th Cir. 1977); *EEOC v. Quick Shop Markets, Inc.,* 526 F.2d 802, 803 (8th Cir. 1975).

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9. Since subpoenaed income tax records normally would be relevant to enforcement of the tax laws, disputes concerning Internal Revenue Service subpoenas usually center on whether the information is being gathered for a civil or criminal purpose. Relevance is not usually disputed. Where the Government has made a prima facie showing through affidavits and testimony, *e.g., United States v. MacKay,* 608 F.2d 830, 833 (10th Cir. 1979); *United States v. Moll,* 602 F.2d 134 (7th Cir. 1979), or the allegations in the Government's moving papers have not disputed, *e.g., United States v. Powell, supra; United States v. Harris,* 628 F.2d 875, 880 (5th Cir. 1980), the Government's burden of proof is not at issue.

In the instant case, the University's verified answer contradicted the claims of relevance in the EEOC's petition and affidavit. Nonetheless, the District Court refused to require the EEOC to go forward with evidence that the information subpoenaed was relevant.

The Third Circuit, while holding that the *Powell* standards apply to Title VII subpoenas (App. A at 5a), failed to consider whether the District Court had improperly shifted the burden of proof on relevance to the University. The Third Circuit merely sifted through the information that was elicited by the University and concluded, without further elucidation, that the information "may provide a useful context for evaluating the practices under investigation."[10]

Allowing a Government agency to stand on its pleadings, which have been contradicted, forces the respondent first to establish the Government's theory of relevance and then to disprove the relevance of the information sought. In the instant case, the EEOC's theory of relevance was that salaries in one School could be compared with salaries in other Schools. The Univer-

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10. The Third Circuit may have felt that the subpoenaed information would be relevant not for comparison purposes, but to establish a pattern or practice of salary discrimination on a university-wide basis. *See, e.g., Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969). However, such a theory is dependent upon evidence of centralized control of salary decisions across many departments or divisions. This theory was not presented at the hearing in the District Court. Had this been the EEOC's claim of relevance, the University would have had the opportunity to show that salary decisions in separate schools of the University are separately made and dependent upon market conditions and other factors not centrally determined.

sity's unrebutted evidence demonstrated that this was not the case.

The Third Circuit, by holding that the salary comparisons sought would provide "a useful context for evaluating the practices under investigation" found relevancy for a reason different than the one asserted by the EEOC at the subpoena enforcement hearing in the District Court. Such a result denied the University a meaningful adversary proceeding, since the University was never given the opportunity to disprove the theory that the statistical information sought concerning other professional schools would provide "a useful context for evaluating the charges under investigation."

This Court should grant certiorari to determine that the *Powell* standards apply to EEOC subpoenas, that the employer subpoenaed is entitled to an adversary proceeding if allegations of relevance are contradicted and that the Government has the burden of going forward to prove the relevance of the information subpoenaed.

4. This Court Should Grant Certiorari Because The Decision Below Implicates Important Issues Of National Interest.

The decision of the court below will have a major and significant impact on academic institutions and businesses alike. The decision below permits widespread discovery by the Government of facts which the undisputed evidence shows are clearly not relevant, solely upon the EEOC's theory that all faculty members are "teachers" and therefore must be involved in performing "similar duties." The decision below, in effect, permits the EEOC to squeeze the academic model into an indus-

trial assembly line mold despite the actual facts of the situation.[11]

The expansive subpoena power given the EEOC by the court below has wide-ranging implications.

First, any charge of salary discrimination by an individual will now force an employer to disclose otherwise confidential and sensitive payroll records.[12] A charging party employed in one discrete segment of an employer's multi-segmented operation could trigger the disclosure of salaries and qualifications in separate and distinct work places.

Second, the harms caused by such disclosure are compounded because the records obtained by the EEOC are then available to the charging party. *EEOC v. Associated Dry Goods Corp.,* 101 S.Ct. 817 (1981).

At a university, such disclosure can only foster academic jealousy and unrest. In this era of double-digit inflation, no issue poses a greater threat to col-

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11. There is no logical line which can be drawn which would restrict the type of information the EEOC demands in the instant case. Nurses could be compared with Engineers, Lawyers and Nuclear Physicists. Historians could be compared with Physicians, Dentists or Physical Therapists. Moreover, the unreasonableness of this approach is further highlighted in the instant case by the fact that the subpoena's broad sweep picks up part-time faculty members despite the undisputed testimony that their function and roles bear no relationship to those of full-time faculty members of the academic community. (R. 105a, 138a, 140a).

12. It is undisputed in the instant case that each School's faculty and payroll records are kept highly confidential and are not disclosed even by one Dean to another Dean. (R. 145a, 155a, 157a).

legial cooperation and harmony than that of academic salaries. Faculty and administrators safeguard faculty payroll records because salaries are frequently the source of intra-faculty rivalries, especially when monetary reward is taken as a measure of professional success and one's worth to the academic institution.[13] Accordingly, anti-discrimination regulations must be discerningly applied to colleges and universities in order to avoid imposing "requirements that blunt that professional drive and discourage salary differentials according to merit of performance as teacher-scholars."[14]

To permit one faculty member or a group of faculty members to discover the salaries of faculty members employed in different professional schools can only serve to exacerbate intra-faculty rivalries in this era of rising costs and shrinking academic dollars. When the undisputed facts show that no valid comparisons can be made, the academic and financial costs[15] of such disclosure outweigh any possible benefits.

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13. R. LESTER, ANTI-BIAS REGULATION OF UNIVERSITIES: FACULTY PROBLEMS AND THEIR SOLUTIONS, at 28 (McGraw Hill, 1974) (Report to the Carnegie Commission on Higher Education). Other academicians have also expressed concern about the effect salary disputes may have on an academic institution's commitment to learning. Trachtenberg, "One Head is Better than Two," *Change,* Vol. 10, at 6-7 (May 1978).

14. R. Lester, note 12 *supra* at 29.

15. *See generally* M. WEIDENBAUM AND R. DEFINA, THE COST OF FEDERAL REGULATION OF ECONOMIC ACTIVITY (American Enterprise Institute, 1978); C. VAN ALSTYNE and S. COLDREN, THE COSTS OF IMPLEMENTING FEDERALLY MANDATED SOCIAL PROGRAMS AT COLLEGES AND UNIVERSITIES (American Council on Education, 1976).

Third, to order the disclosure of marginally relevant information through a subpoena enforcement proceeding on the ground that a subsequent court will determine its admissibility simply ignores the realities of Title VII litigation. For example, in *Johnson v. University of Pittsburgh,* 435 F. Supp. 1328 (W.D. Pa. 1977), an individual charge of sex discrimination in the denial of tenure, and the wide-ranging discovery permitted in connection therewith, resulted in a trial lasting 74 days, involving 73 witnesses, almost 12,000 pages of testimony and 1,000 exhibits, with the court ultimately finding that the University had not been guilty of discrimination.

In another faculty discrimination case, the court was forced to sift through reams of "regression analyses" and other statistics only to conclude finally that "it is almost impossible, in the fact situation that the Court is presented with, to measure the differences in salaries between men and women by statistical analysis." *Presseisen v. Swarthmore College,* 442 F. Supp. 593, 619 (E.D. Pa. 1977), *aff'd without opinion,* 582 F.2d 1275 (3d Cir. 1978). Resolution of relevance disputes at the beginning of a Title VII proceeding will save the courts and litigants the needless time and expense of preparing, producing and explaining statistical comparisons which a court subsequently rules inadmissible.

Fourth, the judicial recognition of such wide latitude in the EEOC frustrates Title VII enforcement. As stated by EEOC Chairperson Eleanor Holmes Norton in her appearance before the House Labor Subcommittee on Employment Opportunities on July 27, 1977:[16]

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16. *Oversight Hearing on Equal Employment Opportunities,* Subcommittee on Equal Employment Opportunities of the Committee on Education and Labor,

"In the past the Commission has tended to construe charges of discrimination broadly and has sometimes encouraged complainants to file charges that contain broad and general allegations of discrimination."

* * * *

"History, however, has demonstrated that this approach has had an adverse effect on individual complainants."

* * * *

"We will better serve both the complainant's interest and the large public interest in eliminating discrimination by separating insofar as possible the processing of the individual complaint and the elimination of systemic discrimination. Thus we will construe complaints as relating to the harm that the individual has suffered. We will investigate that harm. In that investigation, of course, we will examine the extent to which the employer's restriction or exclusion of minorities or women as a class may have contributed to a particular individual employment decision. However, we will do this by a sharply focused investigation of the general statistics of the employer and the activities in the particular unit in which the discrimination is alleged to have occurred. . . ."

Fifth, the extremely sensitive nature of faculty salaries in this era of economic difficulty mandates that, to the extent salary information is required by the EEOC, it be limited as much as reasonably possible.

NOTE 16—*(Continued)*
House of Representatives, 95th Cong., 1st Sess. 51 (July 27, 1977) (Testimony of Eleanor Holmes Norton), reproduced at BNA *Daily Labor Reporter,* No. 145 (July 27, 1977).

Both the academic institution and its faculty members have a reasonable expectation of privacy of the records sought by the EEOC and this expectancy should be protected. *See generally* Mironi, *The Confidentiality of Personnel Records: A Legal and Ethical View,* 1974 Labor L. J. 270 (1974); Comment, *EEOC v. University of New Mexico—10th Circuit Reduces Standards For Production Of Employee Personnel Files In EEOC Investigation,* 1975 Utah L. Rev. 264 (1975).

The very serious consequences of the approach taken by the court below should not be permitted without review by this Court.

5. This Court Should Grant Certiorari Because The Decision Below Conflicts With Decisions Of Other Courts Of Appeals As To The Standard Of Review Of A Ruling That Subpoenaed Information Is Relevant.

In concluding that the EEOC had satisfied the *Powell* criteria for enforcement of its administrative subpoena, the District Court held that the subpoenaed information was relevant. The Third Circuit reviewed this holding on the ground that it was not "clearly erroneous." (App. A at 7a). The Court of Appeals failed to recognize that a different standard of review, legal error, should have been applied on reviewing the District Court's ruling on relevancy.

This failure to recognize the existence of another standard for relevance conflicts with both the District of Columbia and the Fifth Circuits. Both circuits have recognized that the proper standard of review is heavily dependent on the circumstances of a given case. *FTC v. Texaco, Inc.,* 555 F.2d 862, 876, n.29 (D.C. Cir.), *cert. denied,* 431 U.S. 974, *reh. denied,* 434 U.S. 883 (1977); *EEOC v. Packard Electric Division, General Motors*

Corp., 569 F.2d 315, 317-18 (5th Cir. 1978). This Court has also recognized that subpoena enforcement decisions may be susceptible to varying standards of review. *See United States v. LaSalle National Bank*, 437 U.S. 298, 319, n.21 (1978) (leaving for another time a determination of whether the Internal Revenue Service's good faith is a legal or factual question or a combination thereof).

The standard of review that should have been applied in this action was that of legal error. Since the University's unrebutted testimony showed that the professions about which information was sought were totally dissimilar, there was no "factual determination" to be made concerning the relevancy of this information. *Packard Electric Division, supra,* at 318. Instead, the Third Circuit should have followed the District of Columbia and Fifth Circuits and recognized that where, as here, the issue of relevance is "integrally related to a legal premise," *FTC v. Texaco, Inc., supra,* at 876, n.29, then a finding of relevance is to be reviewed under the standard of legal error.

This Court should grant certiorari to determine the standard of review to be applied by the circuit courts in subpoena enforcement proceedings.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the Opinion and Judgment of the Third Circuit.

Respectfully submitted,

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230

Counsel for Petitioner
*Counsel of Record

Of counsel:

RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1854

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Appellee

v.

UNIVERSITY OF PITTSBURGH

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Misc. No. 7653

Argued November 3, 1980
Before: HUNTER, GARTH and HIGGINBOTHAM,
Circuit Judges
Opinion filed March 17, 1981

James J. Restivo, Jr. (Argued)
Diane W. Perer
Reed, Smith, Shaw & McClay
Attorneys for Appellant

Joel M. Cohn (Argued)
Vella M. Fink
Lutz Alexander Prager
Leroy D. Clark
Joseph T. Eddins
Attorneys for Appellee

Opinion of the Court

HUNTER, *Circuit Judge.*

1. Appellant, the University of Pittsburgh, appeals from the district court's order enforcing a subpoena duces tecum issued by the Equal Employment Opportunity Commission (EEOC). The EEOC requested the subpoena pursuant to an investigation of alleged unlawful discrimination by the University against female faculty members in the School of Nursing. The district court held that the issuance of the subpoena was within the power of the Commission and dismissed the University's counterclaim by sustaining the EEOC regulations that permit disclosure of investigative files to the charging party. We affirm the district court's enforcement order and in light of the Supreme Court's recent decision in *EEOC v. Associated Dry Goods,* 49 U.S.L.W. 4149 (Jan. 26, 1981) authorize release of the EEOC's investigative file to the charging party.

FACTS

2. On July 8, 1977, Margaret F. Carroll, Acting Executive Director of the American Nurses Association, ("ANA") filed a charge of sex discrimination with the EEOC. The charge alleged that the University of Pittsburgh discriminated against women faculty members by, *inter alia,* paying them lower monthly salaries than that paid to male faculty.[1]

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1. The complete charge, filed July 6, 1977, alleged:
The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice,

3. The EEOC began its investigation with a request for information concerning the sex, salary levels, experience, and job responsibilities of the faculty in four of the fifteen professional schools on the University's Pittsburgh campus; the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. The University refused to provide the information voluntarily, and on August 1, 1978 the district director of the EEOC's Pittsburgh office issued a subpoena duces tecum for the data.[2] The University filed a petition to quash the sub-

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and as such, is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended.

Exhibit A, Joint Appendix at 9(a).

Margaret Carroll certified she was filing the charge on behalf of twenty-nine present or former faculty members in the School of Nursing who claimed to be aggrieved by the University's practices. On August 12, 1977, the EEOC referred the charge to the Pennsylvania Human Relations Commission (PHRC) pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. §2000-5(c) (1976). The ANA then requested the PHRC to terminate processing the charge, whereupon the EEOC reassumed jurisdiction of the complaint.

2. On August 1, 1978, a subpoena was issued, signed by the EEOC's District Director, requiring the University to produce the following:

1. Produce a list of all assistant instructors, instructors, assistant professors, associate professors

poena, and the Commission denied this request. In November of 1979, the EEOC filed an application to enforce the subpoena, pursuant to section 710 of Title VII, 42 U.S.C. §2000e-9 (1976). The University counterclaimed for injunctive and declaratory relief claiming that the EEOC regulations that permitted the disclosure of investigatory files prior to litigation violated the prohibition against public disclosure contained in section 709(e) of Title VII, 42 U.S.C. §2000e-8(e) (1976).[3]

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and professors in the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. For each, indicate sex, date of hire, date of termination, (if applicable), academic degree held, whether tenured or non-tenured, whether part-time or full-time, and position(s) held during the period June 1975 to present. Additionally, indicate each aforesaid employee's initial salary and present salary and length of term of annual contract of each; i.e., ten months, twelve months, etc.

2. Produce the written/printed functional job descriptions and all written/printed materials describing all duties and job/position requirements of all assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

3. Produce the written/printed qualifications and requirements necessary to perform the duties of each position, occupied by assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

If the records do not exist in the form requested in Item 1 above, production of the information therein requested as most substantively provides the Commission with that information will be accepted as compliance.

Joint Appendix at 28a.

3. The challenged regulations on disclosure of investigative files are found at 29 C.F.R. §§1601.22 & 1610.17(d) (1979).

4. After a full hearing on the merits, the district court ordered enforcement of the subpoena and authorized disclosure of the investigative material in accordance with agency regulations. *See* 29 C.F.R. §1601.22 (1979). In so ruling the court held that although the scope of the subpoena was quite broad, the material requested was relevant to the charge of sex based discrimination and should be produced.

5. On April 4, 1980 the University filed a motion for rehearing which the district court denied. This appeal followed.

DISCUSSION

A. Subpoena enforcement

6. *In Powell v. United States,* 379 U.S. 48, 57-58 (1964) the Supreme Court established three requirements for the enforcement of an administrative subpoena. Specifically, it is the government's burden to prove: (1) that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose; (2) that the information sought is not already within the government's possession; and (3) that procedures required by the agency issuing the subpoena have been followed. *Id. See also United States v. McCarthy,* 514 F.2d 368, 372 (3d Cir. 1975). The trial court found the subpoenaed information to be relevant, not already within the possession of the Commission, and requested pursuant to agency procedure. These findings are not clearly erroneous and we affirm the district court for the reasons discussed below. Fed.R.Civ.P. 52(a). *See Denicola v. G. C. Murphy, Co.,* 562 F.2d 889, 892 (3d Cir. 1977) (factual findings of district court in Title VII cases must be sustained unless clearly erroneous).

7. The University claims that because the EEOC is investigating solely the employment practices of the School of Nursing, the faculty information from other schools is irrelevant. There can be no comparison between the various schools within the University, appellant argues, because, among other things, the composition of the student bodies differs; the courses, programs, and research of each school are distinct; the external competition for faculty positions differs; and the amount of faculty research and publication required varies widely between schools.

8. The EEOC seeks the faculty employment records of four related schools. While the employment data from these schools may not be identical with data from the School of Nursing, such information may provide a useful context for evaluating the practices under investigation. A similar subpoena request was upheld by the tenth circuit in *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974), where the commission requested faculty employment records for the entire college of engineering even though the investigation was limited to the employment practices of the Department of Electrical Engineering and Computer Sciences. In enforcing the subpoena request, the court stressed that the material requested was relevant to the inquiry and sufficiently definite: "The inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is relevant. . . . All that is now required is that the investigation be for a lawfully authorized purpose." *Id.* at 1302, *quoting from, United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). *Compare CAB v. United Air Lines,* 542 F.2d 394, 402 (7th Cir. 1976) (material sought amounted to a "general warrant"—enforcement denied). The material requested

here is not indefinite, but limited to the practices of four related schools within the University. Further, because the School of Nursing faculty is almost totally female, examination of other schools is crucial for any investigation of gender based discrimination. In light of these circumstances the material sought by the Commission is relevant. The investigatory powers of EEOC should be interpreted broadly; the material requested "relate[s] to unlawful employment practices" and is "relevant to the charge under investigation." §709(a); 42 U.S.C. §2000e-8(a) (1976); ***EEOC v. Cambridge Tile,*** 590 F.2d 205, 206 (6th Cir. 1979); ***Motorola, Inc. v. McLain,*** 484 F.2d 1339, 1342 (7th Cir. 1973).

9. The second element of the *Powell* prima facie test for the enforceability of a subpoena requires the Commission to show that the information sought by the subpoena is not already within the possession of the government. *United States v. Powell,* 379 U.S. at 580. The record at trial contains a letter from EEOC compliance officer, Mr. Paul Southworth, III to the University which identifies the material in issue and states that he will need access to it. Joint Appendix at 21a (exhibit F). On the basis of this letter it was not clearly erroneous for the lower court to conclude that the Commission did not possess the requested information.

10. The final criterion outlined by the *Powell* court for enforcing a subpoena requires the Commission to show that it has followed all the procedural steps mandated by statute. In this case, section 709(a) and 710 of Title VII, 42 U.S.C. §§2000e-8(a) & 2000e-9(a) require only that the subpoena be "[i]n connection with any investigation of a charge . . . and relevant to the charge." 42 U.S.C. §2000e-8(a) (1976). The Commission's regu-

lations outlining the procedures for issuing a subpoena require that:

> The subpoena shall state the name and address of its issuer, identify the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested.

29 C.F.R. 1601.17 (1979). All this information was contained within the subpoena.

11. The EEOC's regulations also require that "[d]uring the Commission investigation, the Commission shall verify the authorization of such charges by the person on whose behalf the charge is made." 29 C.F.R. 1601.7 (1979). The district court found correctly that the Commission had satisfied the verification requirement in this instance. The Commission sent out questionnaires to each of the twenty-nine nursing faculty members listed as victims of the University's alleged discriminatory policies. These questionnaires requested various employment information that the individuals supplied. This procedure comported with the verification requirements of 29 C.F.R. 1601.7 (1979).[4]

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4. The University contends that because the Commission did not obtain signed affidavits from each of the twenty-nine individuals, a practice recommended by the EEOC compliance manual (CCH) §8.5(d) (1979), the charge was improperly verified. We reject this argument. As noted above, the procedures followed by the Commission in this case satisfy the mandate of 29 C.F.R. 1601.7 (1979). Further, the EEOC need not follow the procedures outlined in its compliance manual in every case. The manual's provisions are discretionary in this respect, and read that "[t]here may be instances when . . . a particular procedure . . . should not be followed." EEOC Compliance Manual (CCH) ¶ at 3.

B. *Disclosure of Investigatory Files*

12. At trial, the University counterclaimed for a declaratory judgment and injunctive relief claiming that the Commission's disclosure regulations, 29 C.F.R. §§1601.22 & 1610.17(d) (1979), were void and unenforceable. The district court dismissed the counterclaim and we affirm that dismissal.

13. Section 709(e) of Title VII, 42 U.S.C. §2000(e)-8(e) (1976), prohibits any employee of the EEOC, under pain of criminal penalty, from disclosing any information obtained during an EEOC investigation to the public. The challenged regulations carve out an exception to this general prohibition by authorizing disclosure of investigative files on an employer to the charging parties, the respondents, their attorneys, and witnesses when disclosures deemed necessary for securing appropriate relief. 29 C.F.R. §1601.22 (1979).[5] The Supreme Court in *EEOC v. Associated Dry Goods*, 49 U.S.L.W. 4149 (Jan. 26, 1981) recently sustained the

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5. The Commission's general policy on disclosure is set out in 29 CFR §1601.22:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publica-

validity of these precise regulations. In that case, the Court concluded that Congress did not include the charging parties within the "public" to whom disclosure of confidential information is illegal under the provisions of Title VII. Hence release of these files to charging parties does not fall within the disclosure prohibition of section 709(e). *Id.* at 4152-53. The Court did hold, however, that only the charging party is entitled to examine his file: files of similar complaints against the same employer are not to be released. As the Court stated: "there is no reason why the charging party should know the content of any other employee's charge, and he must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger." *Id.* at 4153. Applied to this case, *Associated Dry Goods* mandates disclosure only to Margaret Carroll, the charging party, and her attorney.

14. The judgment of the district court, both in enforcing the subpoena and granting disclosure of the EEOC's file solely to Margaret Carroll and her attorney, will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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tion of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

The Commission also has created very specific special disclosure rules governing the form and scope of disclosure to those persons whom the Commission treats as being separate from the "public" to whom the statute forbids any disclosure. 29 CFR §1610.17(d); EEOC Compliance Manual §63.

Judgment of The Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1854

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
vs.
UNIVERSITY OF PITTSBURGH,
Appellant

(D. C. Misc. No. 7653)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Present: HUNTER, GARTH and HIGGINBOTHAM,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on November 3, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 26, 1980, be, and the same is hereby affirmed, both in enforcing the subpoena and granting disclosure of the EEOC's file solely to Margaret Carroll and her attorney, all in accordance with the opinion of the Court. Costs taxed against appellant.

ATTEST:
/s/ SALLY MRVOS
Clerk

March 17, 1981

Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant v. UNIVERSITY OF PITTSBURGH, Respondent	Miscellaneous No. 7653

OPINION

SNYDER, J.

Before the Court is an application of the Equal Employment Opportunity Commission (EEOC) for an order to require the University of Pittsburgh (University) to comply with the subpoena duces tecum served upon it by the EEOC during its investigation of a charge of unlawful discrimination against female faculty employees with respect to wages and conditions of employment.

I. PRIOR PROCEDURES

The charge filed July 6, 1977 alleged:

"The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice, and as such,

> is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended."

This charge was prepared and signed by Margaret F. Carroll, Acting Executive Director of the American Nurses' Association (ANA). Attached to the charge was an EEOC Form 151, Third Party Certification of Charge, which gave the names, addresses, and telephone numbers of some ANA members aggrieved by the allegedly discriminatory conduct.

On August 12, 1977, the Pittsburgh District Office of the EEOC, pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000-5(c), referred the charge to the Pennsylvania Human Relations Commission. ANA then requested the Commission to terminate processing the charge, and the Commission agreed to do so on August 12th. The EEOC thereupon re-assumed jurisdiction over the charge, and the University was notified on August 17, 1977. EEOC Compliance Officer, Joel Pretz, attempted to secure an early conciliation of the charge but was unable to do so. As a part of the investigation, a letter was sent to the University on June 13, 1978, requesting information; on July 12, 1978, counsel for the University informed the EEOC that it would not voluntarily produce the information and that the EEOC would have to issue a subpoena.

On August 1, 1978, a subpoena was issued, signed by the EEOC's District Director, requiring the University to produce the following:

"1. Produce a list of all assistant instructors, instructors, assistant professors, associate professors and professors in the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. For each, indicate sex, date of hire, date of termination, (if applicable), academic degree held, whether tenured or non-tenured, whether part-time or full-time, and position(s) held during the period June 1975 to present. Additionally, indicate each aforesaid employee's initial salary and present salary and length of term of annual contract of each; i.e., ten months, twelve months, etc.

2. Produce the written/printed functional job descriptions and all written/printed materials describing all duties and job/position requirements of all assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

3. Produce the written/printed qualifications and requirements necessary to perform the duties of each position, occupied by assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

If the records do not exist in the form requested in Item 1 above, production of the information therein requested as most substantively provides the Commission with that information will be accepted as compliance."

The University did not produce the information, but filed a petition with the EEOC seeking revocation of the subpoena on August 3, 1978. On December 22, 1978, the EEOC entered its determination that the subpoena would not be revoked and established January 15, 1979, as the date of production of documents. The University advised the EEOC that it would not comply with the determination.

II. This Action

On November 19, 1979, the EEOC filed the present action with this Court seeking enforcement of the subpoena duces tecum pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-9. Attached to the application was the affidavit of Eugene V. Nelson, EEOC District Director, relating the above facts based on his personal knowledge and review of the EEOC's investigative file, entitled "American Nurses Association v. University of Pittsburgh, Charge No. 034-771609". This Court, on the same day as the application was received, entered an order directing the University to appear on December 12, 1979, to show cause why the subpoena should not be enforced. At the University's request, this hearing was continued to provide the University an opportunity to file an answer and a reply brief. An answer and counterclaim was filed on January 16, 1980 by the University, denying that it is legally required to produce any of the evidence requested by the subpoena.

The University offered numerous defenses:

1. It alleged that ANA members were employed only by the University's School of Nursing and that the information sought was a comparison of faculty mem-

bers employed in different schools, who had different education and training, different academic missions and goals, received different external funding, had different students, program course and course loads, and in all other respects were "not interchangeable or fungible".

2. It alleged that disclosure would result in an unwarranted invasion of the privacy of the University's employees.

3. It alleged that the information would be used only to develop comparative evidence of the University's employment practices and would not further any legitimate EEOC inquiry, thus resulting in direct, immediate, substantial and irreparable harm to the University and its employees.

4. It alleged the subpoena was overly broad and requested information which could not possibly bear any relationship to the subject of the charge filed with the EEOC and, thus, that the EEOC lacked standing to investigate any schools other than the School of Nursing, or to investigate alleged sex discrimination against female faculty members of any school other than the School of Nursing.

5. It also set forth that the subpoena would require the University to prepare compilations of data and perform other research which could not legally be demanded of it by the EEOC, and which would be unduly burdensome.

By way of counterclaim, the University sought, in addition to an order dismissing the EEOC's application, a declaratory judgment under 28 U.S.C. §§2201-2202 that the EEOC regulations with respect to disclosure of information obtained during an investigation were void

and unenforceable, based on Section 709(e) of Title VII, 42 U.S.C. §2000e-8(e), prohibiting any EEOC employee, under pain of criminal penalty, from making public any information obtained during the course of an investigation, and that the EEOC, in compliance with its own regulations (29 C.F.R. §1601.22), discloses information obtained in investigations to certain persons as a matter of course, including charging parties, witnesses and their attorneys. The University claimed that such regulations directly controvert the purposes of the statute, thwarting encouragement of voluntary compliance by stimulating the filing of private actions at the same time that conciliation efforts are occurring, and that disclosure to such persons is tantamount to disclosure to the public at large.

By agreement of counsel, the show cause hearing was held February 6, 1980, and the parties were given full opportunity at that time to present all available evidence.

III. Discussion

A. *The Power to Issue the Subpoena*

The EEOC is authorized by statute at 42 U.S.C. §2000e-5(b) to conduct investigations to determine if an employer, such as the University, is committing employment discrimination in violation of Title VII.

A charge may be filed with the EEOC "by or on behalf of a person" allegedly aggrieved by unlawful employment practices. The EEOC has implemented this Section through procedural regulations, 29 C.F.R. §1601.7, providing that when the charge is on behalf of an aggrieved individual, the person making the charge give to the EEOC the names, addresses and telephone

numbers of persons on whose behalf the charge is being made. Thereafter, the EEOC Compliance Officers are to verify the authorization of such charge. Here, the charging party has satisfied the requirements of this Section with respect to more than 20 allegedly aggrieved persons.

Title VII, Section 709(a), 42 U.S.C. §2000e-8(a), grants to the EEOC and its representatives "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this sub-chapter and is relevant to the charge under investigation."

In addition, the provisions of 29 U.S.C. §161 are made applicable to EEOC proceedings under Section 710, 42 U.S.C. §2000e-9, and this authorizes the EEOC to require attendance and testimony at its hearings, provides for a petition to revoke the subpoena, and grants the Federal district courts jurisdiction to enforce EEOC subpoenas. 42 U.S.C. §2000e-5(f)(2); 29 U.S.C. §161(2).

The University does not seriously dispute that the subpoena here was properly issued, and we so find.

B. *The Scope of the Subpoena*

Both parties concede that administrative subpoenas may be judically enforced, provided three tests are met: (1) the investigation is within the authority of the agency, (2) the subpoena is not too indefinite, and (3) the information sought is relevant to the charge under investigation. *United States v. Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (an Internal Revenue Service summons); *United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 369, 94 L.Ed. 401, 415-16

(1950) (a Federal Trade Commission order requiring the filing of reports). Since subpoena enforcement proceedings are summary in nature, this Court is not called upon to decide the issues before the administrative agency for determination, nor are we called upon to determine whether probable cause exists to believe that the University has violated the law. *United States v. Powell, supra; Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *EEOC v. Chrysler Corp.,* 567 F.2d 754 (8th Cir. 1977); *EEOC v. Quick Shop Markets, Inc.,* 526 F.2d 802 (8th Cir. 1975).

Here, the EEOC is investigating a Title VII charge which is within its Congressionally mandated authority. *EEOC v. Western Publishing Co.,* 502 F.2d 599 (8th Cir. 1974); *Parliament House Motor Hotel v. EEOC,* 444 F.2d 1335, 1340 (5th Cir. 1971); *Blue Bell Boots, Inc. v. EEOC,* 418 F.2d 355, 358 (6th Cir. 1969). The first prong of the abovementioned three part test has been met.

The University does not make any contention that the subpoena is too indefinite to be enforced. As indicated previously, it requires a listing of the professors in four schools, the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work, indicating sex, date of hiring, date of termination, academic degrees, initial salary, present salary, and contracts of each. It requires production of functional job descriptions and written qualifications and requirements. Thus, the second prong of the three prong test is also met.

We come now to the serious contentions of the Respondent which will be discussed *seriatim.*

1. *The Competency and Relevancy of the Information*

It has been the University's consistent position that the charge being investigated by the EEOC is one involving female faculty members in the School of Nursing and that faculty salaries in other schools are irrelevant. It offered considerable testimony that the salaries of faculty members in the four schools are not comparable because: (1) the composition of the student bodies differ with respect to undergraduate, graduate, full-time, part-time, etc.; (2) the courses, programs and research followed are entirely distinct; (3) the sources of external funding are entirely different; (4) the amount of research and publications required vary; (5) subservience to accrediting bodies varies; (6) the nature of external competition for employees varies, for example, drug companies recruiting pharmacy school faculty compared to the need of hospitals for nurses; (7) the degrees held and schools attended by the faculty are different, as well as the tenure and length of service; (8) the professional representation and standing in the academic community varies; and (9) the courses, research loads and advising loads vary.

When this matter was raised with the EEOC on the petition to revoke the subpoena, the EEOC replied that salary comparisons may show that "women instructors and professors performing similar duties [as male professors] are paid lower salaries."

The EEOC Compliance Manual sets forth that the "scope of inquiry" is normally limited to:

> "[T]he relevant immediate environment, the department, or other similar organizational structure within the decision making authority of one person, where the claim of personal aggrievement arose."

EEOC Compliance Manual § 20.9, CCH EEOC Compliance Manual ¶769.

Here, however, the entire faculty in the School of Nursing is female and information beyond the School of Nursing may be crucial to the EEOC's determination of probable cause. *See Rich v. Martin Marietta Corp.*, 522 F.2d 333, 344 (10th Cir. 1975) (requested information on plant-wide basis was relevant since it might be crucial to establishing prima facie case).

We are cited the opinion of Judge Barron P. McCune of this Court in *Hopewell v. University of Pittsburgh*, 79 F.R.D. 689, 694 (W.D.Pa. 1978), which rejected a comparison of non-comparable groups. In addition, the University cited several cases which have rejected comparisons of faculty jobs in one school with those of different schools. We agree with the approach in those cases. However, each case involved a finding by the court on the merits of the case that the plaintiff failed to establish the equality of one teaching position *vis-a-vis* another.

As previously noted, the Court's function in a subpoena enforcement proceeding is to determine the relevancy of the requested material. Here, the EEOC seeks salary and related information of male and female professors in the allied health schools. It is true that faculty members of different schools may not be fungible, but this does not mean that the Court can rule at this point that the information is irrelevant. As noted by the EEOC in its brief, "whether information pertaining to one school may aid in an investigation of another school is a matter which cannot be determined until the information is examined." We cannot take the word of the University nor does it arise from the evidence, that the

statistics requested will be meaningless. In this regard, we are reminded by Judge Barrett of the Tenth Circuit in *EEOC v. University of New Mexico*, 504 F.2d 1296, 1302-03 (10th Cir. 1974), that "the broad sweep of [Title VII] is directed to the elimination of employment discrimination", and the law governing the limits on the administrative power of investigation is not so circumscribed as to prevent the enforcement of subpoenas unless they are plainly incompetent or irrelevant to any lawful purpose. *See also EEOC v. Cambridge Tile Manufacturing Co.*, 590 F.2d 205 (6th Cir. 1979) (Notions of relevancy at investigatory stage are very broad, and so long as EEOC is not wandering into wholly unrelated areas, it has the power to subpoena documents concerning any employer practice which may shed light on discrimination charged).

We note that the charge here is not restricted to the School of Nursing, but its dimensions are University-wide. The EEOC points to the fact that they have not attempted in this subpoena to go University-wide, but only seek information relative to particular schools thought to be of comparative relevance to establish or refute a conclusion that reasonable cause exists to believe discrimination has occurred on a University-wide level, or at a lower level. We do not, at this time, pass upon the University-wide conclusion sought to be established, for that question is not before us.

2. *The Subject of the Charge*

As previously noted, the University also took the position that the Schools of Health Related Professions, Social Work and Pharmacy, which, in addition to the School of Nursing, were subjects of the subpoena re-

quest, were separate and distinct segments of the University and therefore the EEOC had no standing to seek salary information on female faculty members who were not, and could not be, represented by the ANA.

The University claims that the right of an organization to file a charge is derivative of the alleged grievance of its members. The University does not dispute the ability of the ANA to file a charge on behalf of persons "claiming to be aggrieved", but they would limit the effect of the charge to the School of Nursing faculty which, incidentally, are all females.

It is true, for example, that a complainant's charge of race discrimination does not permit the EEOC to investigate sex discrimination. *King v. Georgia Power Co.*, 295 F.Supp. 943 (N.D.Ga. 1968), *aff'd* 412 F.2d 462 (5th Cir. 1969). But this does not mean that the ANA cannot challenge activity which affects its members by a University-wide policy. This is not a situation as revealed in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), where the Club failed to allege that its members were adversely affected by the proposed action. Even in the *Sierra* case, the court recognized that an organization whose members are injured may represent those members in a proceeding for judicial review. The nurses here are allegedly injured by the University-wide policy and the EEOC is conducting the investigation thereon. Therefore, there is no substance to the claim that the EEOC lacks standing to inquire into comparative salaries of other schools, so that the subpoena would be in excess of its statutory authority.

3. *Burdensomeness*

The University raises, but does not strongly argue, that it has no lists or other compilations containing all of the requested data and, therefore, the EEOC requirements would be burdensome to it. It offered no evidence that an excessive burden would be imposed in light of the restriction of the subpoena to the four schools. Furthermore, it is noted that Item 1 of the subpoena states that if the information is not in existence, production of the requested information "as most substantively provides the Commission with that information will be accepted as compliance."

Even if production of evidence imposes some burden, we believe that so long as the information requested is relevant and material, the cost is "part of the social burden" of our present day society, *see Bradley Lumber Co. v. NLRB,* 84 F.2d 97 (5th Cir. 1936), and may include the compilation of lists prepared from existing records. *New Orleans Public Service, Inc. v. Brown,* 507 F.2d 160 (5th Cir. 1975). *Cf. NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

4. *The Confidentiality and Privilege of the Information Sought*

The University takes the position that the EEOC seeks salary and other data which goes to the heart of its relationships with its faculty members in four different schools. They claim that disclosure would do irreparable harm to the University while providing no tangible benefit to the EEOC.

While the information may be extremely important to the University, this argument was not accepted by Judge Barrett in *EEOC v. University of New Mexico,*

supra, where he cogently reasoned that an invocation of the Fourth Amendment prohibition against unreasonable searches and seizures, predicated on the basic proposition that faculty personnel files are confidential, could not be sustained in light of the proscription contained in the statute against public disclosure, in any matter, of information obtained in the course of investigation (42 U.S.C. §2000e-8(e)). *Cf. Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973) (denying a taxpayer's Fifth Amendment claim of privilege in an Internal Revenue investigation based upon the expectation of privacy of records delivered to his accountant for the purpose of preparing his income tax return). Thus, although the information sought may be confidential, this is not a basis for denying enforcement of the subpoena.

C. *The Counterclaim*

By way of counterclaim, the University seeks a declaratory judgment and an injunction that regulations promulgated by the EEOC permitting disclosure of information obtained during the course of an investigation are void and unenforceable, and seeks an injunction against disclosing any information obtain in this investigation to *any person*. As noted, Section 709(e) of Title VII, 42 U.S.C. §2000e-8(e), prohibits any employee of the EEOC, under pain of criminal penalty, from making public any information obtained during the course of any EEOC investigation. Regulations promulgated by EEOC at 29 C.F.R. §§1601.22 and 1610.17(d), as implemented in the special disclosure rules of the EEOC Compliance Manual, authorize the EEOC to release information obtained during its investigations to "charging parties, or their attorneys, respondents or their at-

torneys or witnesses where disclosure is deemed necessary for securing appropriate relief."

Our investigation reveals that the restrictions upon disclosure by the EEOC of investigative information contained in §§2000e-5(b) and 2000e-8(e) and their effect upon the validity of EEOC's Regulations and Compliance Manual have been considered by four Courts of Appeals with conflicting conclusions. The Fifth Circuit in *H. Kessler & Co. v. EEOC,* 472 F.2d 1147 (5th Cir.) (en banc) *cert. denied* 412 U.S. 939, 93 S.Ct. 2774, 37 L.Ed.2d 398 (1973), held that charging parties and their attorneys are not members of the "public" within the meaning of the restrictive statutory language and consequently the Regulations and the Compliance Manual do not exceed the statute and thus are valid and enforceable. The District of Columbia Circuit in *Sears, Roebuck & Co., v. EEOC,* 581 F.2d 941 (D.C. Cir. 1978), the Seventh Circuit in *Burlington Northern, Inc. v. EEOC,* 582 F.2d 1097 (7th Cir. 1978), *cert. denied* 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979), and the Fourth Circuit in *EEOC v. Joseph Horne Co.,* 607 F.2d 1075 (4th Cir. 1979), reached the opposite conclusion. The Third Circuit has not considered this problem.

The analysis of the legal arguments, the legislative history and the policy considerations on both sides of the question are fully developed in *Kessler, Sears, Burlington,* and *Horne*; further argument will accomplish little.

In our opinion, the statutory scheme of enforcing Title VII is consistent with the position taken under 29 C.F.R. §1610.17(d), that individual charging parties are not members of the public within the meaning of Section 709(e). We will therefore direct that the EEOC

shall make no disclosure of the investigative material except in accordance with the above cited regulations. The subpoena subject to the protective order as above indicated, will be enforced.

An appropriate order will be entered.

/s/ DANIEL J. SNYDER, JR.
United States District Judge

Dated: March 26, 1980

cc: Lanier E. Williams, Esq.
EEOC—Philadelphia District
127 North 4th Street
Philadelphia, Pa. 19106

James J. Restivo, Jr., Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pa. 15219

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant
v.
UNIVERSITY OF PITTSBURGH,
Respondent

Miscellaneous No. 7653

ORDER

AND NOW, to-wit, this 26th day of March, 1980, after hearing and due consideration of the arguments and briefs of counsel, and for the reasons set forth in the Opinion filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Respondent shall comply with the EEOC subpoena in its entirety. The University of Pittsburgh is therefore directed to comply with the subpoena as shall be directed by the EEOC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the EEOC shall make no disclosure of the material obtained as a result of the instant investigation except in accordance with 29 C.F.R. §§1601.22 and 1610.17(d).

/s/ DANIEL J. SNYDER, JR.
United States District Judge

cc: Lanier E. Williams, Esq.
James J. Restivo, Jr., Esq.

Appendix C

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant v. UNIVERSITY OF PITTSBURGH, Respondent	Miscellaneous No. 7653

ORDER*

AND NOW, this 7th day of April, 1980, *the Opinion and Order dated March 26, 1980, is hereby amended in the following respects:* Motion denied.

1. The University contended and the Court finds that the EEOC did not obtain affidavits from allegedly aggrieved persons as required by the EEOC's own Manual.

2. The School of Nursing had at least one male faculty member during the period covered by the subpoena.

3. The sole purpose of the EEOC subpoena was to request information that would allow the EEOC to compare instructors or professors across school lines. The

*The italicized portion of this Order represents that portion of the proposed Order which the District Court crossed out in entering its Order denying the Motion. See R.181a-182a of the Appendix in the Third Circuit.

uncontradicted evidence establishes that the jobs and salaries of faculty members in different schools are not comparable.

4. There is no evidence in the record establishing the relevancy of the information sought as it relates to part-time faculty members.

5. The School of Social Work is not a health-related school.

6. Under the regulations of the EEOC, information collected in this investigation could be disclosed to the American Nurses' Association, the 29 allegedly aggrieved persons and attorneys for each of the foregoing.

7. The enforcement of the EEOC subpoena is hereby denied.

/s/ DANIEL J. SNYDER, JR.
United States District Judge

APPENDIX D

The pertinent statutory provisions of Title VII of the Civil Rights Act are the following:

Section 709(a) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-8(a):

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Section 710 of Title VII, 78 Stat. 264, *as amended,* 42 U.S.C. §2000e-9:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

The pertinent statutory provisions of the National Labor Relations Act are the following:

Section 11 of the National Labor Relations Act, 49 Stat. 455, *as amended,* 29 U.S.C. §§161(1) and 161(2):

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times

have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession,

within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2066

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF PITTSBURGH, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CONSTANCE L. DUPRE
Acting General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's order enforcing the Commission's subpoena, which requested certain information concerning the sex, salary, job responsibilities, and required qualifications of faculty members in four of the University's fifteen professional schools.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported. The opinion of the district court (Pet. App. 12a-27a) is reported at 487 F. Supp. 1071.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1981. The petition for a writ of certiorari was filed on June 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1977, a charge of sex discrimination was filed with the Commission on behalf of 29 present and former faculty members of the School of Nursing of the University of Pittsburgh. The charge alleged that "[t]he University of Pittsburgh has discriminated, and is still discriminating,

against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a n.1).[1]

2. The Commission began its investigation of this charge by requesting that petitioner provide certain information concerning the sex, salary levels, experience, and job responsibilities of faculty members in four of the 15 professional schools at its Pittsburgh campus: Health Related Professions, Nursing, Pharmacy, and Social Work (Pet. App. 3a).[2] On August 1, 1978, after petitioner had refused to provide this information voluntarily, a subpoena duces tecum was issued by the Commission (*id.* at 3a-4a n.2). Thereafter, in November 1979, the Commission sought enforcement of this subpoena in the United States District

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[1]The charge, which was filed by Margaret I. Carroll, acting director of the American Nurses Association, alleged that (Pet. App. 2a-3a n.1):

> The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice, and as such, is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended.

[2]The University had previously declined to participate in settlement discussions prior to the Commission's undertaking of a formal investigation and reasonable cause determination (Pet. App. 13a).

Court for the Western District of Pennsylvania under Section 710 of Title VII, 42 U.S.C. 2000e-9 (Pet. App. 4a).[3] On January 16, 1980, petitioner filed an answer and counterclaim in which it asserted that it was not legally required to produce any of the information requested by the subpoena (*id.* at 15a).

3. On March 26, 1980, following a full evidentiary hearing on the Commission's subpoena enforcement application, the district court found that the subpoena should be enforced under *United States* v. *Powell*, 379 U.S. 48 (1964), because the Commission's investigation was within its authority, the subpoena was not too indefinite, and the information sought was relevant to the charge under investigation (Pet. App. 16a-27a). Specifically, the court rejected petitioner's claim that information concerning the faculty of the four professional schools was not relevant to the Commission's investigation of the sex discrimination charge filed on behalf of the female members of the nursing faculty, noting that the very language of the charge showed that "the charge here is not restricted to the School of Nursing, but its dimensions are University-wide" (*id.* at 22a). Further, the court found that "the entire faculty in the

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[3]The Commission's application for enforcement of the subpoena included the affidavit of the district director who issued the subpoena, as well as the Commission's final determination denying the University's petition for revocation of the subpoena. The Commission's determination stated (Br. in Opp. 4):

> [T]he information requested * * *, especially as to sex and job descriptions, will demonstrate the employment patterns and practices of the [University] and may support the Charging Party's claim of discrimination if, for example, it should develop that women instructors and professors performing similar duties are paid lower salaries than male instructors and professors. Salary comparisons may also be necessary for the purpose of fashioning relief. All of the material sought will provide comparative evidence which is probative and necessary to the resolution of Title VII cases.

School of Nursing is female and information beyond [that school] may be crucial to the EEOC's determination of probable cause" (*id.* at 21a).[4] The court also agreed with the Commission's contention that the question whether salary and related " 'information pertaining to one school may aid in an investigation of another school is a matter which cannot be determined until the information is examined' " (*ibid.*).[5]

4. The court of appeals affirmed, holding that the Commission had satisfied the requirements for enforcement of an administrative subpoena under *United States* v. *Powell*, 379 U.S. 48 (1964). First, the court found that the information required by the subpoena was relevant to the charge under investigation because "such information may provide a useful context for evaluating the practices under investigation" (Pet. App. 6a). Second, the court found that the information that the Commission sought was "not indefinite, but limited to the practices of four related schools within the University" (*id.* at 6a-7a). Finally, the court noted that "because the School of Nursing faculty is almost

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[4]The district court also rejected petitioner's contention that enforcement of the subpoena should be denied because the information sought was "confidential" (Pet. App. 24a-25a). Likewise, the court rejected (*id.* at 25a-27a) petitioner's argument (in connection with its counterclaim for injunctive and declaratory relief) "that regulations promulgated by the EEOC permitting disclosure of information obtained during the course of an investigation are void and unenforceable."

[5]Contrary to petitioner's assertion (Pet. 4-5), the Commission's investigator explained at the evidentiary hearing in the district court the basis upon which the four schools had been chosen. He stated (R. 58a):

> [W]hen we originally picked them, we decided we would question the charging parties—the aggrieved parties—and find out which ones may be similar to the School of Nursing as far as health-related professions. But we were not going to confine it to that, but what we wanted to do at that point was just to get a sampling of the comparison groups, males and females, in each school. We did not want it to be burdensome.

totally female, examination of other schools is crucial for any investigation of gender based discrimination" (*id.* at 7a).[6]

ARGUMENT

The courts below correctly held that the Commission's subpoena should be enforced because it requested information that was relevant to the charge under investigation, which alleged discrimination "against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees" (Pet. App. 2a n.1), and otherwise satisfied the requirements for enforcement of an administrative subpoena. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and further review is therefore unwarranted.

1. Petitioner contends (Pet. 9) that information concerning faculty positions in schools other than the School of Nursing is irrelevant because "academicians with different professional backgrounds, training and experience are neither similar to nor comparable to one another." Petitioner's contention is not well-founded, however, because it ignores the scope of the charge, which alleges University-wide sex-based wage discrimination. Moreover, the Commission necessarily must examine such information before it can determine whether there is reason to believe that petitioner discriminates against women faculty members as a general matter. See *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). Here, the Commission properly chose to begin its investigation by examining data from the School of Nursing (with respect to which the charging party had direct knowledge) and three related schools.

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[6]The court of appeals also held that the district court had correctly concluded that the Commission "did not possess the requested information" (Pet. App. 7a). Likewise, the court of appeals upheld the district court's finding that the Commission had followed "all the procedural steps mandated by statute" and regulations (*id.* at 7a-8a).

2. Even if the charge had been limited to the School of Nursing, however, the scope of the Commission's subpoena would have been proper.[7] The courts of appeals have recognized that the Commission's investigatory powers are broad, and its investigation is not limited to those claims advanced by a charging party. See, *e.g.*, *Motorola, Inc.* v. *McLain*, 484 F. 2d 1339, 1342 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *New Orleans Public Service, Inc.* v. *Brown*, 507 F. 2d 160 (5th Cir. 1975); *EEOC* v. *University of New Mexico*, 504 F. 2d 1296 (10th Cir. 1974). See also *General Telephone Co.* v. *EEOC, supra*, 446 U.S. at 331.

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[7]Petitioner's contention (Pet. 10) that information concerning faculty positions in other schools of the University is irrelevant as a matter of law is insubstantial in light of *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), in which the Court held that the Bennett Amendment of Title VII, 42 U.S.C. 2000e-2(h), does not limit Title VII's prohibition of sex-based discrimination to those practices that would also violate the "equal pay" standard of the Equal Pay Act of 1963, 29 U.S.C. 206(d). Even if petitioner is correct in its assertion that faculty positions in other schools are not "equal" to those of the School of Nursing, the subpoenaed information may be relevant in determining whether a pattern of sex-based discrimination exists. Especially in light of the virtually all-female character of the School of Nursing faculty, sex-based wage disparities in other schools of the University (if not explained by factors other than sex) may well constitute probative evidence of discrimination. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-580 (1978). Cf. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F. 2d 169, 179 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978) (average salaries of male and female faculty established pattern of sex discrimination in compensation, but insufficient evidence was presented to determine to what extent other factors contributed to plaintiff's compensation). The relevance of such information is particularly obvious where, as here, the record suggests that salary determinations are the result of a centralized decision-making process. Contrary to petitioner's representation (Pet. 17 n.10), the Dean of the School of Social Work testified that petitioner's central administration is ultimately responsible for approving all faculty salaries, that there are general University-wide salary, promotion, and tenure guidelines, and that all University faculty must satisfy general University-wide publication, teaching, and practical work requirements (R. 116a-122a, 124a, 127a-130a, 132a).

The courts have thus routinely upheld Commission subpoenas seeking information with respect to job classifications, departments, and employment practices other than those directly implicated in the charge. See, *e.g.*, *EEOC* v. *Cambridge Tile Manufacturing Co.*, 590 F. 2d 205, 206 (6th Cir. 1979) (information concerning sex discrimination in job classification relevant to charges of sex and race discrimination in firing); *EEOC* v. *University of New Mexico, supra*, 504 F. 2d at 1299-1302 (information concerning all faculty members in college of engineering relevant to individual charge of retaliatory discharge).[8] The information requested by the subpoena, which concerns not only salaries of male and female professors, but also job functions, requirements, and qualifications, is plainly relevant and essential to the determination that the Commission is required to make.[9]

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[8]The decisions upon which petitioner relies (Pet. 11-12) do not demonstrate the existence of any conflict warranting review. Petitioner points to several decisions (see *ibid.*) that have limited Commission subpoenas, but those decisions involved only very narrow individual charges, rather than allegations of facility-wide discrimination, such as those at issue here. By contrast, those cases enforcing broad Commission subpoenas (see Pet. 12) involved charges of facility-wide discriminatory practices, such as the charge at issue here.

[9]Petitioner's reliance (Pet. 10) on *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974), is misplaced because those cases involve the weight to be given comparative statistical evidence at trial. Similarly, *Lemons* v. *City and County of Denver*, 620 F. 2d 228 (10th Cir.), cert. denied, No. 80-82 (Oct. 6, 1980), *Keyes* v. *Lenoir Rhyne College*, 552 F. 2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977), and *Christensen* v. *Iowa*, 563 F. 2d 353 (8th Cir. 1977), involve the sufficiency of trial evidence to prove sex-based wage discrimination. None of these cases holds or suggests that information showing sex-based wage disparities is irrelevant to the Commission's inquiry. See also *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), slip op. 4 n.8. Because this case concerns only the enforcement of a subpoena issued by the Commission in aid of its investigation, the suggestion of amicus curiae American Council on Education (Br. 7;

3. Petitioner's view (Pet. 9-12) that the Commission must prove at the threshold of its investigation that faculty positions in various schools are "equal," to establish the relevance of the information sought, would create an unbearable burden and deprive the Commission of an opportunity to make a thorough investigation.[10] Petitioner's argument, which would "mean that the Commission, in its investigation, must not ask any questions to which it does not already know the answers, has about it the aura of another, and bygone, legal era" (*Local No. 104, Sheet Metal Workers Int'l Ass'n* v. *EEOC*, 439 F. 2d 237, 241 (9th Cir. 1971)). Indeed, petitioner's view is inconsistent with the very purpose of a subpoena enforcement proceeding: "to discover and procure evidence, not to prove a pending charge or complaint." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946). See *EEOC* v. *Chrysler Corp.*, 567 F. 2d 754 (8th Cir. 1977). That the information requested here is relevant is clear from the face of the charge. See pages 1-2, 5-7 *supra*. Moreover, the relevance

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emphasis in original) that "[t]he issue presented in this case is whether women who are faculty members in a predominantly female professional school can establish sex discrimination *solely* by comparing their salaries to those paid to men on the faculties of other separate and distinct professional schools" is well wide of the mark.

[10]Contrary to petitioner's contention (Pet. 15, 18), this case does not present the question whether the requirements set forth in *United States* v. *Powell*, 379 U.S. 48 (1964), apply to Commission subpoena enforcement proceedings. It is well established that the *Powell* requirements apply generally to administrative subpoena enforcement proceedings, and both courts below applied these requirements (see Pet. App. 5a, 18a-19a). At all events, petitioner challenges only the relevance of the information sought, a question that was properly decided by both courts below.

Likewise, the appropriate standard of review is not at issue because the court of appeals determined both that the district court's finding of relevance was not clearly erroneous and that the district court's decision was in accord with established legal standards (see Pet. App. 6a-7a).

of the information was further confirmed both by the affidavit of the district director who issued the subpoena and by the final determination of the Commission with respect to the University's revocation petition. Both of these documents set forth the relationship between the information sought and the Commission's investigation of the charge of University-wide sex discrimination. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 637, 653 (1950); *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 U.S. at 190 nn.2 & 3, 191, 214-216. The Commission was not required to come forward with any additional evidence.[11]

4. Finally, petitioner's concern (Pet. 19-20) that compliance may result in public disclosure of salary information is unfounded. The court of appeals held that such information may be disclosed only to the charging party and her attorney, and, pursuant to this Court's decision in *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981) slip op. 7 (footnote omitted), only after the charging party has "execute[d] a written agreement not to disclose the information to any other person, except as part of the normal course of litigation after a suit is filed." Similarly, the fact that petitioner may consider the subpoenaed salary information to be sensitive or confidential provides no basis for denying the Commission the information necessary to investigate alleged violations of the law. See *Couch* v. *United States*, 409 U.S. 322, 335-336 & n.19 (1973); *United States* v. *Miller*, 425 U.S. 435, 445-446 & n.8 (1976).

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[11]The courts, including the Third Circuit, have consistently held that the government may establish relevance by petition and affidavit (*United States* v. *Garden State National Bank*, 607 F. 2d 61 (3d Cir. 1979); *United States* v. *Davis*, 636 F. 2d 1028 (5th Cir. 1981)), and this Court has recognized that district courts may, in appropriate circumstances, enforce agency subpoenas without providing a full hearing (*CAB* v. *Hermann*, 353 U.S. 322 (1957)). Here, a hearing was held, and petitioner was provided a full opportunity to show why the subpoena should not be enforced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

CONSTANCE L. DUPRE
Acting General Counsel
Equal Employment Opportunity Commission

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No. 80-2066

IN THE

Supreme Court of the United States

October Term, 1980

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230
(412) 288-3122

Counsel for Petitioner

*Counsel of Record

Of Counsel:

RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT

This reply brief is submitted in response to the brief of the respondent Equal Employment Opportunity Commission ("EEOC") in opposition to the University of Pittsburgh's (the "University") Petition for a Writ of Certiorari. Respondent's Brief in Opposition limits itself to an argument that the decision below was correct. As such, respondent's Brief in Opposition either ignores or concedes the reasons presented by the University and by Amicus Curiae which militate in favor of the granting of certiorari. To reiterate those reasons, certiorari should issue because the decision below conflicts in principle with decisions of other courts of appeal concerning whether salaries paid in one profession are relevant to salaries paid in totally separate and distinct professions; the decision below is inconsistent with prior rulings of this Court concerning the burden of proof of relevancy in a subpoena enforcement action and, most importantly, after *Gunther*,[1] the nation's colleges and universities, as well as other employers, must have guidance concerning whether the mere payment of different salaries to different groups of people in different and unrelated professions, absent any intentional discrimination, violates Title VII of the Equal Employment Opportunity Act.

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1. *County of Washington v. Gunther,* 101 S.Ct. 2242 (1981).

II. ARGUMENT

1. Respondent's Brief In Opposition Argues That The Level Of Salaries Paid To Faculty Members In Schools Separate, Distinct And Independent From The School Of Nursing Are Relevant To Determine The Existence Of Salary Discrimination Against Faculty Members In The School Of Nursing. The Cases Relied Upon By Respondent Are Inapposite.

The cases cited by the respondent (*Respondent's Brief in Opposition,* at 6-7) suggesting that the EEOC has investigatory powers which go beyond that of the factual allegations of the complaining party, either involve employment settings where generally one central person or department makes all employment decisions, or where a facility-wide employment policy is at issue.[2]

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2. In *Motorola, Inc. v. McLain,* 484 F.2d 1339 (7th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974) the information requested related to two plants where, among other things, segregated seniority lines were at issue. In *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974), the inquiry was limited to a single school out of many at one university.

New Orleans Public Service, Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975) is simply not on point. That case dealt with whether or not the EEOC could investigate a particular charge. *General Telephone Co. v. EEOC,* 446 U.S. 318 (1980) similarly is inapplicable; it held that the EEOC need not seek class certification as a representative of a class before seeking classwide relief. The other cases cited by the respondent are representative of one line of cases which has construed the EEOC's investigative powers broadly. However, a second line of cases also exists which has limited the EEOC's investigatory powers. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 779-802 (1976 & Supp. 1979).

Although generally unarticulated, such centralization of personnel functions is a crucial assumption to the decisions cited by the respondent, for without such control the salary decisions in one department could not possibly be relevant to establish a "pattern or practice" of discrimination in separate and unrelated departments.[3]

In addition, the legal arguments suggesting centralized control of salary decisions set forth by the EEOC should not be recognized by this Court. The EEOC offered absolutely no testimony at the hearing supportive of this legal theory. Had the EEOC attempted to establish this theory of relevance at the hearing, the Uni-

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3. The respondent erroneously contends that the testimony of David Epperson, Dean of the School of Social Work, established centralized salary administration. (*Respondent's Brief in Opposition,* at 6, n.7.)

A close examination of the total testimony of Dr. Epperson, the Dean of the School of Social Work, (R.103a-131a) shows that he did not testify that faculty salaries are centrally controlled within the University. Rather, his testimony and that of the other deans demonstrates that each school is unique, that salary information is not disclosed to other schools of the University, and that various factors influence recommendations for salaries. Each Dean weighted these factors for their school very differently. This is well illustrated by Exhibit A (R.160a) admitted into evidence by the District Court. In addition, as noted in the Brief of Amicus Curiae (at 8-9), the vagaries of the marketplace have a significant impact on faculty salaries. Factors such as demand for teachers in certain disciplines, the needs of business for graduates with particular skills and funding for research directly impact on faculty salaries. The suggestion that such salaries are comparable is not supported by the record or the literature on the subject. *See* Treatises and Articles cited in the Brief of Amicus Curiae at 8-9, 14.

versity would have had the opportunity to present evidence concerning the setting of salaries and how salaries in separate professional schools are separately determined. Because the respondent did not allege centralized salary administration at the trial court level, the record was not totally developed by the parties.[4] At a minimum, this Court should remand this case to the District Court so that a full record can be developed on the issue of centralized control.[5]

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4. The failure of the EEOC to raise the theory of relevance based on centralized control is another reason for reversal of this case. Admittedly the Government need not prove discrimination before it can issue the subpoena, but *United States v. Powell,* 379 U.S. 48 (1964), places the burden on the Government to establish that the material sought is relevant. The District Court incorrectly placed this burden on petitioner. The failure of the Government to prove the potentially relevant theory of centralized salary administration as justifying the subpoena runs afoul of the mandate of *Powell.*

5. The EEOC also claims that because the charge filed "alleges University-wide sex-based wage discrimination" the information sought is relevant. (*Respondent's Brief in Opposition,* at 5.), Respondent ignores the Third Circuit's finding that the charge was filed by Margaret Carroll "on behalf of twenty-nine present or former faculty members in the School of Nursing . . ." (App. A at 3a, n.1). The EEOC has not challenged this holding by the Third Circuit.

2. The EEOC Contends That This Court's Recent Decision In County Of Washington v. Gunther, 101 S.Ct. 2242 (1981) Makes Salaries Paid In One Profession Relevant To Salaries Paid In Totally Different Professions. This Contention Is Erroneous.

In *Gunther,* this Court in a 5 to 4 decision, held that jail matrons alleging intentional sex discrimination could attempt to prove their claims by introducing evidence of salaries paid to male guards in the same jail. This Court found that the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h) does not restrict Title VII's prohibitions against sex discrimination to those actions which also violate the Equal Pay Act, 29 U.S.C. §206(d). This Court, however, was careful to point out that its decision did not approve the theory of "comparable worth." 101 S.Ct. at 2246.

Paul Southworth, the EEOC Compliance Officer, testified that the *sole* purpose of his investigation was to compare professors across school lines. (R.75a) The charging party in this case merely alleged the payment of different salaries and did not allege any intentional discrimination such as the surveys involved in *Gunther* or the key sheets and job evaluation manual involved in *International Union of Electrical Workers v. Westinghouse Electric Corp.,* 631 F.2d 1094 (3d Cir. 1980), *cert. denied,* —— U.S. —— (1981). Nevertheless, the respondent contends, (*Respondent's Brief in Opposition,* at 6, n.7) that *Gunther* holds that this information is relevant. This interpretation by the agency which enforces Title VII provides one of the strongest reasons why certiorari should be granted, for its places a tremendous power in the EEOC to interrupt the day to day activities of the academic world when the agency in its

discretion believes that certain unrelated positions should be compared. As a result the respondent apparently has adopted the theory of comparable worth, thus far resisted by this Court.

3. The Uncertainty Of The Applicability Of Gunther To Cases In Which There Is No Evidence Of Intentional Discrimination Is An Additional Reason That This Court Should Grant The Petition For A Writ Of Certiorari.

The holding in *Gunther, supra,* was limited to cases of intentional discrimination. 101 S.Ct. at 2246. In this case, the discrimination charged is based solely on a comparison of dissimilar jobs. Without an allegation of intentional discrimination, a reviewing agency as well as the courts have no choice but to engage in a subjective evaluation of the "comparable worth" of "comparable" positions.[6]

Lower courts have held that salary discrimination cannot be found where all that the court has before it is a comparison of salaries. *E.g. Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980) (nurses may not be compared to non-nursing positions); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (comparison of the salary of female clerks with male workers in physical plant department of state university is improper.)

This Court has before it no more than a variety of dissimilar jobs, with no objective basis for comparison of those jobs and no allegation of intentional discrimination. If *Gunther* permits the "comparable worth" evalua-

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6. As indicated by the record, the professional positions at issue here, unlike the prison guard jobs in *Gunther,* are not even "comparable."

tion sought by the EEOC in this case, this Court should specifically so hold. The Petition for a Writ of Certiorari should be granted so that this significant issue may be resolved.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the University of Pittsburgh respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230

Counsel for Petitioner

*Counsel of Record

Of Counsel:

RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

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UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SHELDON ELLIOT STEINBACH
(Counsel of Record)
General Counsel
American Council on Education
Suite 824
One Dupont Circle, NW
Washington, DC 20036
(202) 833-4738

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MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and The Associate Justices of the United States Supreme Court:

Pursuant to Rule 36 of the Rules of this Court, the American Council on Education (the "Council") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioner, the University of Pittsburgh (the "University"), in this case. In support of this motion, the Council shows as follows:

1. The American Council on Education is a voluntary nonprofit membership corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council's membership consists of over 1400 public and private colleges and universities in the United States and over 340 educational associations and organizations.

2. The Council is the major coordinating body for all segments of post-secondary education in the United States and has represented the interests of higher education before the Executive, Legislative and Judicial branches of Government. The Council has a depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements as they impact on the nation's colleges and universities. The Council is thus uniquely qualified to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

3. Substantially all of Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. #2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case.

4. Because of its interest in issues pertaining to equal opportunity, on several other occasions, the Council has sought and been granted permission by this Court to file briefs as *Amicus Curiae. See, e.g., Camenish v. University of Texas,* ____ U.S. ____ (1981); *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Cannon v. University of Chicago,* 441 U.S. 677 (1979); *Board of*

Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1979).

5. The Council, and its members, have broad knowledge concerning the practical and legal application of the statutes and related issues involved in this case. Because of this knowledge and its extensive experience as *amicus curiae* in other cases, the Council is well situated to brief this Court on the practical as well as legal implications of the issues presented by the decision below.

6. Consent to file this brief has been requested from both parties but has not yet been received.

WHEREFORE, it is respectfully moved that the American Council on Education be granted leave to file the accompanying *Amicus Curiae* brief in this case.

Respectfully,

SHELDON ELLIOT STEINBACH
(Counsel of Record)
General Counsel
American Council on Education
Suite 824
One Dupont Circle, NW
Washington, DC 20036
(202) 833-4738

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-2066

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The American Council on Education (the "Council") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by the University of Pittsburgh (the "University").

STATEMENT OF THE CASE

On Juiy 8, 1977, an officer of the American Nurses' Association ("ANA") filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of certain female faculty members in the Univer-

sity's School of Nursing. The charge alleged that "the University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying lower monthly salaries than the ones paid to male faculty employees."

Thereafter, The EEOC issued a subpoena seeking, for a three-year period, salary and other information on faculty members employed in the School of Nursing and on all faculty members employed in three other professional schools of the University: the School of Social Work, the School of Health-Related Professions and the Schools of the Pharmacy. The information subpoenaed by the EEOC included the sex, date of hire, academic degree, tenure status, and initial and present salaries of all such faculty members. The EEOC asserted the information was relevant because, in the EEOC's view, discrimination could be inferred if "women instructors and professors performing similar duties are paid lower salaries than male instructors and professors."

The University refused to provide the salary data requested because it believes the salaries of faculty members in professional schools other than the School of Nursing are irrelevant to any investigation of the complaint before the Commission and because it believes the disclosure of such irrelevant personally identifiable data constitutes an unwarranted invasion of privacy which contravenes the University's policy and practice of maintaining all faculty salaries in strict confidence. The EEOC moved to enforce the subpoena and the University filed a verified answer denying the relevance of faculty salaries paid in professional schools distinct from the School of Nursing. The verified answer asserted that faculty members in separate professional schools had such different education, training, missions, goals, external funding, students, programs,

courses and course loads that their salaries could not be compared.

Despite the existence of controverted allegations of relevance, the District Court placed on the University the burden of going forward with evidence to disprove the relevance of the information sought. The University then went forward with the evidence and established, through the EEOC investigator who prepared the subpoena, that the sole reason the EEOC sought information on schools unrelated to the School of Nursing was to compare the salaries of faculty members in those schools with the salaries of faculty members in the School of Nursing.

The University then established, through the unchallenged testimony of the Deans of the four professional schools involved, that no such comparisons could be made because faculty members in separate professional schools had differing skills, duties and responsibilities, backgrounds and training, research and publication responsibilities, and other separate missions and tasks. Moreover, the unrebutted evidence adduced by the University at the hearing established that the demands of the marketplace for differing professional expertise caused differing professional salaries.

The District Court issued an Order enforcing the subpoena. The Third Circuit Court of Appeals affirmed, holding that information involving separate professional schools "may provide a useful context for evaluating the practices under investigation" and that the information sought was relevant because the School of Nursing was "almost totally female." The Third Circuit, while apparently recognizing that the Government has the burden of proof on the question of relevance, did not expressly rule on the University's contention that the burden had been improperly placed on the University.

REASONS FOR GRANTING THE WRIT

Faculty members engaged in different disciplines command different salaries, depending upon supply and demand in the academic marketplace and the level of student enrollments, alumni support, government appropriations and extrinsic competition for faculty services. The issue presented in this case is whether women who are faculty members in a predominantly female professional school can establish sex discrimination *solely* by comparing their salaries to those paid to men on the faculties of other separate and distinct professional schools. This issue was specifically left unresolved by this Court's recent decision in *County of Washington v. Gunther,* 49 U.S.L.W. 4623 (June 8, 1981).

Currently, salaries paid to faculty in one professional or scholarly field are not determined by or dependent upon salaries paid to faculty in other professional or scholarly fields. Colleges and universities in the United States do not determine the salary of a history professor based upon the salary necessary to attract or retain a pharmacy professor for the institution's school of pharmacy. The salary of a teacher in a home economics department is not governed by the salary necessary to attract a professor of surgery in an institution's school of medicine. The salary paid to a professor of maternity nursing is not dependent upon the salary necessary to attract or retain a professor of electrical engineering. It is extremely important for the nation's colleges and universities to know whether federal law requires a change in these salary administration practices.

In addition, institutions of higher learning in this country need to know whether an administrative agency is entitled to unlimited access to sensitive, confidential, personally identifiable faculty records without first

demonstrating the relevance of those records to the resolution of a claim properly before that agency. The nations' colleges and universities should not be burdened by the costs and problems incident to disclosure of such records, and the privacy interests of their faculty members should not be intruded upon further, without this Court's determination of who has the burden of proving relevance or lack of relevance of such records.

For these reasons, amicus respectfully urges that certiorari be granted.

ARGUMENT

1. This Court Should Grant Certiorari To Determine Whether, Under *County of Washington v. Gunther*, Charging Parties Under Title VII Can Establish A Cause of Action For Salary Discrimination Based *Solely* Upon a Comparison Of Salaries Paid To Faculty Members In Different Professional Fields.

The academic marketplace, like any other, is responsive to market forces which reflect supply and demand.[1] Not surprisingly, supply and demand for faculty services in a specific field is a dynamic process which, at any given point in time, is dependent on such factors as: the level of student enrollments, government funding and research and development expenditures by private industry in that field;[2] the extent of demand for such services by com-

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[1]Krueger, "The Changing Economic Status of the Profession and the Impact of Inflation," *Academe*, December 1979, at 487 (1979).

[2]*See* Krueger, note 1 *supra*.

peting government and industry employers;[3] and the number of new graduates entering the marketplace to compete for the available job opportunities.[4]

As a result, faculty members engaged in different disciplines command different salaries. For example, during the 1979-1980 academic year, Professors of Law, Business Computer Sciences, Medicine and Engineering at 68 state universities and land-grant colleges had substantially higher salaries than Professors of Agriculture, Education, Fine Arts and Nursing.[5] The same factors apply even within academic fields. For example, faculty members teaching Petroleum Engineering today can command salaries substantially greater than faculty engaged in Civil Engineering.[6]

The issue presented in the instant case and specifically left unresolved by this Court's recent decision in *County of Washington v. Gunther*, 49 U.S.L.W. 4623 (June 8, 1981), is whether, absent an allegation of intentional discrimination, Title VII permits a cause of action based on a comparison of the wage rates of different jobs.

The charge filed by the ANA in the instant case merely alleged that the University paid female members in the School of Nursing less than the University was paying

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[3]Hunter, Ventimiglia & Crow, "Faculty Moral in Higher Education," 31 *Journal of Teacher Education*, 27, 28 (March-April, 1980).

[4]*See* Krueger, note 1 *supra*.

[5]Office of Institutional Research, Oklahoma State University, "How Much Professors Are Paid," *The Chronicle of Higher Education*, at 9 (April 14, 1980).

[6]Office of Institutional Research, Oklahoma University, "Faculty Salaries, By Discipline," *The Chronicle of Higher Education*, at 10 (April 14, 1980).

male faculty members which the evidence established were employed in separate and distinct professional schools. The charge did not allege that such underpayment, if established, was the result of intentional discrimination based upon sex.

In *County of Washington v. Gunther, supra,* this Court, in a 5 to 4 decision, held that female guards could attempt to establish a case of intentional salary discrimination under Title VII by introducing evidence of the salaries paid to male guards in the same jail, where the salaries of the females, but not the males, were set at a level lower than that warranted by the County's own survey of outside markets and the worth of the jobs. In so holding, the majority decision in *Gunther* emphasized that its ruling was a narrow one limited to cases of intentional discrimination and that the case did not involve the "controversial concept of 'comparable worth'." 49 U.S.L.W. at 4624-25, 4628. The Court defined "comparable worth" as a claim for increased compensation based upon a comparison of the intrinsic worth or difficulty of a particular job compared to other jobs in the same organization or community. 49 U.S.L.W. at 4625.

The majority opinion in *Gunther* pointed out that respondents had distinguished *Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980), on the ground that in *Lemons,* the plaintiff nurses, who were employed by a public hospital, sought increased compensation (without direct proof of intentional discrimination) on the basis of a comparison of their salaries with the salaries paid to non-nurse employees the plaintiffs asserted were of comparable value to the community. 49 U.S.L.W. at 4625 n.7.

The instant case is more similar to *Lemons* than to *Gunther* in that here the American Nurses' Association is at-

tempting without any direct allegation of intentional discrimination, to obtain increased compensation for its constituents by comparing their faculty salaries with those paid in unrelated professional schools. The case squarely involves a charge of discrimination based solely upon "a *comparison* of the wage rates of dissimilar jobs," (emphasis in original), 49 U.S.L.W. at 4635, (Rehnquist, J., dissenting), in that EEOC admittedly is attempting to compare wage rates paid in separate and distinct professions – despite the unrebutted evidence that no such comparisons can be made – and is not alleging any intentional discrimination. In addition, unlike *Gunther,* the charge here requires a Court to make its own subjective assessment of the comparable values of completely dissimilar jobs. 49 U.S.L.W. at 4628-29.

In cases not involving intentional discrimination, other courts of appeals have found that salary discrimination cannot be proven by comparing the salaries of one profession with those of another. *Lemons v. City and County of Denver, supra* (comparison of nurses' jobs to other jobs is inappropriate). *See also Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (female professor could not show sex-based salary discrimination by comparing her salary to the salaries of professors in other departments of a university); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (female clerical employees at a state university could not establish salary discrimination by comparing their salaries with male employees in a school's physical plant department). *Cf., EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974) (in subpoena enforcement action, salaries of other faculty members in a School of Engineering were relevant to discrimination charge by faculty

members in the Electrical Engineering Department of that School).

As indicated by Justice Rehnquist, *Gunther's* narrow holding does not establish any legal criteria by which courts and litigants can determine what, if any, salary comparisons are relevant under Title VII. Without further guidance from this Court, *Gunther* will spawn further litigation "as surely as day follows night."[7] This case should be treated as a natural corollary to *Gunther,* and this Court should determine whether Title VII permits "a cause of action based on a comparison of the wage rates of dissimilar jobs," the type of comparisons at issue herein. If such comparisons are not appropriate, the salary administration practices currently in place at most of the nation's colleges and universities will not be affected by *Gunther.* If such comparisons can be made, then extensive changes in current practices may be necessary. This important issue should be decided promptly.

2. This Court Should Grant Certiorari To Resolve Whether An Academic Employer Has The Burden Of Going Forward With The Evidence On Whether Salary Comparisons Between Different Professions Are Relevant.

In subpoena enforcement actions not involving Title VII subpoenas, this Court and many circuit courts have held that the Government has the burden of establishing that the information sought is relevant to a legitimate administrative purpose. *United States v. Powell,* 379 U.S. 48 (1964); *United States v. LaSalle National Bank,* 437 U.S.

[7]Finger, "Analysis of U.S. Supreme Court Ruling In County of Washington v. Gunther," *BNA Daily Labor Reports,* No. 117, at A-2.

298 (1978); *United States v. McCarthy,* 514 F.2d 368 (3rd Cir. 1975).

It is unclear, however, how the *Powell* standards apply in Title VII subpoena actions. The burden of proof question presented in this case is whether the EEOC established the relevance of the material sought merely by stating its belief that faculty members in separate and distinct professional schools are all "teachers" who must be "performing similar duties" and, therefore, whose salaries must be comparable. This misconception, absent any evidence to support it, should not be sufficient to meet the *Powell* standards.

The Council is particularly distressed that on appeal the Third Circuit appeared to hold that the salary data sought by the EEOC was relevant for a reason other than that claimed in the court below. Whatever the Third Circuit meant by holding that the information subpoenaed "may provide a useful context for evaluating the practices under investigation," this justification for relevance was not presented by the EEOC in the District Court. Moreover, it provides no guidance to the EEOC or to academic institutions as to how and why practices in separate and distinct professional schools provide a useful context for evaluating practices in a School in Nursing.

Accordingly, the Council respectfully submits that this Court should grant certiorari in order to enunciate the standards and procedures to be followed in subpoena enforcement actions against academic institutions under Title VII.

3. This Court Should Grant Certiorari Because The Decision Below Implicates Important Issues Of National Interest.

The subpoena in the instant case is extremely broad, and, undisputed facts of record show that the information sought is of little or no relevance to the complaint being investigated by the EEOC. The cost of complying with administrative subpoenas is a cost that necessarily reduces the pool of funds available for carrying out an institution's educational programs and activities. This is especially important today, when the nation's colleges and universities are faced with shrinking enrollments, declining endowments and less generous legislative appropriations.[8] While complying with administrative subpoenas is a burden all citizens including the nations' colleges and universities must bear, it is not a burden which should be placed lightly upon academic institutions. Certainly, where information is *clearly* relevant, an institution must absorb the expense and time of producing requested information. However, where the information is not relevant, the institution should be permitted to spend its resources in furtherance of its primary mission- educating students.

Accordingly, amicus respectfully submits that this Court should grant the petition in this case and resolve these issues of national importance.

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[8]*See, e.g.,* Jacobson, "What Worries College Presidents," *The Chronicle of Higher Education* 11 (Aug. 25, 1980); Tuckman & Tuckman, "The Structure of Salaries at American Universities," 47 *Journal of Higher Education* 51 (Jan., Feb. 1976).

CONCLUSION

For the foregoing reasons, the American Council on Education respectfully urges this Court to grant certiorari in the instant case.

Respectfully submitted,

SHELDON ELLIOT STEINBACH
General Counsel
American Council on Education
Suite 824
One Dupont Circle, NW
Washington, DC 20036
(202) 833-4700